No. 89-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP,

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF CERTIORARI AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE CONGRESSIONAL BLACK CAUCUS, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL BLACK MEDIA COALITION, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS

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LIMITED PARTNERSHIP,

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v.

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Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The Congressional Black Caucus (CBC), the National Association for the Advancement of Colored People (NAACP), the National Black Media Coalition (NBMC) and the League of United Latin American Citizens (LULAC), hereby respectfully move for leave to file a brief as amici curiae in support of petitioner's petition for certiorari. The Petitioner's counsel of record, the Office of the Solicitor General and the Federal Communications Commission have all consented to the filing. The consent of counsel of record for the respondent was requested but refused. Both the consent and the refusal have been filed with the Clerk of the Court.

Respectfully submitted,

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BRIEF OF AMICI CURIAE CONGRESSIONAL BLACK CAUCUS, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL BLACK MEDIA COALITION, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS

INTEREST OF AMICI CURIAE

The Congressional Black Caucus ("CBC") was formed in 1970 when thirteen Black members of the U.S. House of Representatives joined together to strengthen their efforts to address the legislative concerns of Black and minority citizens. The vision and goals of the original thirteen members, "to promote

the public welfare through legislation designed to meet the needs of millions of neglected citizens," has been reaffirmed through the legislative and political successes of the Caucus. The CBC is involved in legislative incentives ranging from full employment to welfare reform, South African apartheid and international human rights, from minority business development to expanded educational opportunity.

The National Association for the Advancement of Colored People ("NAACP") is the oldest and largest civil rights organization in the United States. It is a non-profit corporation with over 500,000 members and 2,300 branches and youth units in the fifty states and the District of Columbia. The basic aims and purposes of the organization are to advance minority participation in all aspects of society and to destroy restrictions, burdens, limitations or barriers based upon race or color. The NAACP has long been involved in strengthening the machinery for combatting discrimination within the media and in maintaining the few policies aimed at remedying societal discrimination and promoting diversity of broadcast programming.

The National Black Media Coalition ("NBMC") is the principal civil rights organization focusing its attention on minority employment and ownership in the broadcast media. It played a central role in the creation of the distress sale policy which is before this Court for review, and participated in this case in the D.C. Circuit as an *amicus curiae*. Since its founding in 1973, NBMC has played a role in dozens of adjudicatory and rulemaking proceedings in which it sought to vindicate and expand the FCC's minority ownership policies.

The League of United Latin American Citizens ("LULAC") is a sixty year old national membership organization concerned with vindicating the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. LULAC has actively participated in promoting minority employment and minority ownership policies in the broadcast media before the FCC and the Courts, including participation in this case in the D.C. Circuit as an *amicus curiae*.

This case, involving as it does the possible weakening of the distress sale policy implemented by the Federal Communications Commission ("FCC") and approved by Congress, is of paramount concern to the *amici*. The policy in question is designed not only to remedy minority underrepresentation in broadcasting, stemming from past discrimination, but also to promote diversity of broadcast programming. It is because of the overriding public consequences of this case that the *amici* are filing this brief as *amicus curiae*.

SUMMARY OF ARGUMENT

The decision below presents an important and novel question of federal law and calls into question an established policy of a federal agency and is therefore the type of decision that makes certiorari appropriate for this Court. Further, certiorari would be appropriate because there is now no adequate guidance on the issues in this case from the D.C. Circuit, which is the only circuit that can resolve FCC issues arising in adjudications. 47 U.S.C. § 402(b).

The FCC's reliance on diversification is a sufficient basis for establishing a distress sale policy. Diversi-

fication constitutes a compelling governmental interest. Because Congress has specifically endorsed the FCC's distress sale policy, the decision below raises serious questions of the separation of powers since Judge Silberman and Judge MacKinnon did not give proper deference to Congressional findings as required under the Separation of Powers Doctrine.

While *amici* believe that Congress may rely on the promotion of diversity as a basis for the distress sale policy, *amici* contend in the alternative that if this Court were to find that the diversity rationale is not adequate, it should remand to the FCC with directions for the agency to consider whether it was actively involved in discrimination.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

The decision of the D.C. Circuit presents an important and novel question of federal law which should be decided by this Court. The Court of Appeals erred in holding that the distress sale policy is unconstitutional, applying an incorrect standard of scrutiny and ignoring the findings and intentions of the Congress. This Court should correct this error of law.[1]

Certiorari should also be granted because the decision below overturned an established administrative policy of a federal agency. This Court has generally grant certiorari when the ruling of a Court of Appeals invalidates an established agency practice, thus seriously interfering with an important administrative policy. *See e.g., Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 342-43 (1979). This type of interference is especially egregious where Congress and this Court have actively encouraged such a policy. *Amici* respectfully submit that the Court should address this issue to provide much needed future guidance to the Commission and those regulated by it.

Finally, direction is needed, and certiorari should be granted, because the decision below has created confusion on FCC matters within the Court of Appeals that only this Court can resolve. On the one hand, the D.C. Circuit has upheld the FCC policy that provides for consideration of integration of minority owners into station management as a factor in comparative licensing hearings. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). On the other hand, a divided court in this case held that the distress sale policy is unconstitutional. Thus, two different panels within less than one year have made contradictory rulings with respect to the continued viability of the *West Michigan* case. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d at 902 (D.C. Cir. 1989); *Winter Park*, 873 F.2d at 347. Therefore, certiorari is needed in this case in order to clarify the status of the Commission's policy.

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[1] *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 365 (1955).

II. THE FCC's DISTRESS SALE POLICY IS A CONSTITUTIONAL IMPLEMENTATION OF CONGRESS' MANDATE TO PROMOTE DIVERSITY

A. Promotion of Programming Diversity Through the Distress Sale Policy Serves a Compelling Purpose.

The goal of diversification of information has been, throughout the FCC's history, the most significant social imperative guiding FCC regulation and, under the analysis of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), serves as a sufficient basis for establishing and implementing the race-conscious distress sale policy. The FCC has sought for many years to maximize diversity of ownership of broadcast stations in furtherance of the ultimate goal of maximizing the diversity of programming and viewpoints available to the public.[2] The Commission crystallized those goals in its *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), which accorded major significance to promoting diversity of broadcast expression through diversity of broadcast ownership. The distress sale policy itself was adopted by the FCC because:

> "[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and

[2] *See, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951).

> educates the diversified programming which is a key objective not only of the Communications Act of 1934 but also the First Amendment.

Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979, 981-82 (1978). The distress sale policy has proven effective and has "contribut[ed] significantly to increased minority ownership in broadcasting." *Commission Policy Regarding the Advancement of Minority Ownership in Broadcast*, 92 F.C.C.2d 849, 852 (1982).[3]

In addition, diversification of information is a compelling governmental purpose because it is central to the achievement of First Amendment goals, as this Court recognized in 1943 in declaring the First Amendment to rest upon the principle that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) (holding that certain exclusive news-sharing arrangements violated the Sherman Act).[4] This Court

[3] Scholarly comment on the distress sale policy has been universally laudatory. McKee, *The Federal Communications Commission and Minority Ownership of Broadcast Facilities: A Federal Administrative/Regulatory Model for the Fostering of Greater Minority Entrepreneurship*, 12 Nat'l. Bar Ass'n. L.J. 75, 84 (1983) (describing the policy as a "positive regulatory action by a governmental agency to foster minority entrepreneurship within the industries over which it has statutory and administrative jurisdiction."). *See also*, Hammond, *Now You See It, Now you Don't: Minority Ownership in an "Unregulated" Video Marketplace*, 32 Cath. L. Rev. 633, 651 (1983).

[4] *See also, FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978), *quoting Columbia Broadcasting*

went further, in 1969, when it declared that FCC actions aimed at increasing diversity of information fostered the goals of the First Amendment. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (since broadcasters use a scarce resource, they must provide programming which serves the public interest). Moreover, this Court has ruled that diversification is a valid basis for establishing minority preferences, stating that the FCC's EEO rules "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976). *See* Frawley, *Revised Expectations: A Look at the FCC's Equal Employment Opportunity Policies*, 32 Fed. Comm. B.J. 291, 292-300 (1981); Smith, *The Broadcast Industry and Equal Employment Opportunity*, 30 Lab. L.J. 659, 662-64 (1979).

B. The D.C. Circuit Erred in Refusing to Defer to Congress' Endorsement of the FCC's Method of Achieving this Compelling Purpose.

Congress also has approved the distress sale policy and has thereby implicitly made the findings about societal discrimination, and the appropriateness of a proper and narrowly tailored remedy, which this Court approved in *Fullilove*. In 1982, Congress specifically provided that minority ownership incentives are necessary, stating, "[t]he underlying policy objective of these preferences is to promote the diversification of

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System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973) and *Associated Press v. United States*, 326 U.S. 1, 20 (1945). *See also, Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971).

media ownership and consequent diversification of programming content." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982). The Conference Committee concluded that:

> "[An] important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities-groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

Id. at 43.

Congress also has recognized the need to remedy past discrimination. "[T]he effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982).

In 1987 and 1988, Congress reaffirmed its strong support for minority incentive programs. Congress attached an appropriations rider to its Continuing Resolution. The rider prohibited the FCC from using federal funds to repeal, retroactively apply changes in, or continue reexamination of the comparative li-

censing, distress sales and tax certificate policies. Pub. L. No. 100-202, 101 Stat. 1329 (1987). In reenacting this law for fiscal year 1989, the Senate Appropriations Committee noted that:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and woman audiences.

S. Rep. 182, 100th Cong., 1st Sess. 76 (1987).

When Congress reaffirmed its support of the distress sale policy, Congress' intent was clear: it approved the FCC's policy of increasing diversity through minority ownership. Thus with the efforts, endorsement and encouragement of both the this Court and the Congress, the Commission has for more than a decade interpreted the public policy favoring diversification to encompass advancing minority ownership as a means of enhancing diversity of viewpoints in broadcasting and as a means of satisfying a compelling governmental interest.

Realizing the importance of diverse programming, Congress, in which the Congressional Black Caucus[5] is a principal advocate, charged the FCC in 1978 to implement programs such as the distress sale policy. Congress also suggested that minority incentive programs should be implemented to resolve the FCC's

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[5] The Congressional Black Caucus endorses this brief supporting the Petition for Writ of Certiorari to this Court.

comparative hearings problems. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

Because Congress has specifically endorsed the FCC's distress sale policy, the D.C. Circuit's ruling that the policy is unconstitutional raises a serious question of the separation of powers between Congress and the courts. This Court still maintains its deference to Congress and the D.C. Circuit should have done so as well. " . . . [W]e are bound to approach our task with appropriate deference to the Congress, a co-equal [branch]." *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Citing to *Fullilove*, Justice O'Connor in *City of Richmond v. Croson*, 109 S. Ct. 706 (1989) made it clear that courts' role in reviewing actions of Congress is different from their role in reviewing actions of state or local governments. Congress has more power than the states to "identify and redress the effects of society-wide discrimination. . . . " *Id.* at 719. Thus, it is apparent from the Constitution and previous Supreme Court cases that Congress has the power to sanction race-conscious programs such as the distress sale policy in order to remedy past discrimination and to diversify the broadcast industry. *See also, West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

However, Judge Silberman and Judge MacKinnon failed to give proper weight to Congressional action. Judge MacKinnon did not defer to the Congressional judgment that the distress sale policy is not appropriately tailored for accomplishing the diversity objective of the FCC, *Shurberg*, 876 F.2d at 930, 933 and Judge Silberman went even further and refused to accept Congress' determination that a nexus exists

between diversity of ownership and diversity of programming. *Id.* at 914-15. Judge Silberman's and, to a lesser extent, Judge MacKinnon's opinions ignore the distinction between the role of the court and that of the Congress in making these judgments and providing direction to administrative agencies. In other words, both judges refused to recognize that the separation of powers doctrine precluded them from holding the Congressionally approved distress sale policy unconstitutional. Their action was in the terms of Judge Wald's dissent, "simply judicial presumptiveness." *Shurberg*, 876 F.2d at 940.

C. The Court May Remand this Case to the FCC for consideration of Past Involvement in Discrimination by the Agency Itself.

For the reasons set out above, *amici* believe the findings of Congress and the FCC concerning the need for diversity in programming, and the nexus between that diversity and the distress sale policy, are more than sufficient to warrant reversal of the decision below. *Amici* believe a federal agency need not have discriminated in its own activities and practices in order to implement a race-conscious program such as the one here. But if it did, then race-conscious policies are not only constitutionally appropriate but are necessary to redress to such governmentally sponsored discrimination. Congress and agencies of Congress (here the FCC) may rely on societal discrimination as the basis of these programs even if a non-Federal body could not. *Fullilove*, 448 U.S. at 448; *see also, Croson*, 109 S. Ct. at 706. However, if the Court were to conclude that additional justification for the distress sale policy is necessary, it can find that justification in the need to remedy the discriminatory effects of the FCC's own policies and practices.

Although no formal record on the matter yet exists, a full hearing would reveal that the FCC's own policies and practices have contributed to the exclusion of minorities from opportunities in broadcasting, and have lent significant economic support to discriminatory businesses.

In the not-too-distant past, the agency renewed the licenses of applicants with records of flagrant discrimination in programming. *See e.g., Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969). The FCC has also held that persons who conduct discriminatory business practices qualify for licensure. *Chapman Radio and Television Co.*, 24 F.C.C.2d 282 (1970) (applicant part owner of segregated cemetery and participated in decision to maintain segregation); *Southland Television Co.*, 10 Rad. Reg. (P&F) 750, *recon. denied*, 20 F.C.C. 1959 (1955) (operator of segregated movie theaters qualified to hold license. FCC awarded full faith and credit to state law which allowed segregation). The FCC has also licensed and thereby has endorsed the policies of colleges and universities that were totally segregated.[6]

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[6] Some of the many examples include KASU-FM, Jonesboro, AR, licensed to Arkansas State University in 1957; WBKY-FM, Lexington, KY, licensed to the University of Kentucky in 1941; WUNC-FM, licensed to the University of North Carolina in 1952; KUHF-FM, Houston, TX, licensed to the University of Houston in 1950, KUT-FM, licensed to the University of Texas in 1958;

The FCC not only supported discrimination in its specific licensing decisions, but also adopted policies that had a discriminatory impact. For example, it was not until 1981 that the Commission revoked its so-called *Ultravision* rule, which imposed unrealistically stringent financing requirements that had inhibited minorities from obtaining licenses. *See, Ultravision Broadcasting Company*, 1 F.C.C.2d 544 (1965); *repealed in, New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants*, 87 F.C.C.2d 200, 201 (1981). The FCC also continues to maintain a policy that favors applicants with prior broadcast experience, and has explicitly refused to discount experience obtained during the period when minorities were excluded from broadcasting jobs. *Radio Jonesboro, Inc.*, 100 F.C.C.2d 941, 946 n.13 (1985). Finally, the FCC has failed to enforce effectively the EEO obligations of broadcast licensees. *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *National Black Media Coalition v. FCC*, 775 F.2d 342 (D.C. Cir. 1985). Not until 1989 did the FCC find a broadcaster guilty of employment discrimination. *Catoctin Broadcasting of New York*, 4 F.C.C. Rcd. 2553, 2558, *recon. denied*, 4 F.C.C. Rcd. 6312 (1989), *appealed*, D.C. Cir. No. 89-1552 (September 14, 1989). Because these reported cases and rulings strongly indicate the FCC's own actions have had discriminatory effects, *amici* respectfully request the Court to grant *certiorari* in this case and, if it

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WTJU-FM, licensed to the University of Virginia in 1957. The FCC thus created an opportunity for further segregation. But for the FCC's action, the schools would not have been able to segregate their schools because these schools could not have operated their schools of broadcasting, designed to prepare students for careers in that field, without an FCC license.

determines that the FCC has not yet offered an adequate justification for the distress sale policy, consider remanding the case to the agency for reconsideration.

CONCLUSION

For the reasons set forth above, *amici* Congressional black Caucus, National Association for the Advancement of Colored People, League of United Latin American Citizens and National Black Media Coalition respectfully request this Court to grant Astroline's petition and to reverse the judgment of the District of Columbia Court of Appeals.

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